Supreme Court, U. S.
FILED
APR 15 1977
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1976

No. 76-1305

WILLIAM M. SIMS,

Petitioner,

v.

VIRGINIA ELECTRIC AND POWER COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING THE PETITION

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April 13, 1977

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BRIEF FOR RESPONDENT IN OPPOSITION TO GRANTING THE PETITION

Respondent, hereafter referred to as Vepco, opposes the Petition for Writ of Certiorari sought by Petitioner, hereafter referred to as Sims, to review the decision of the United States Court of Appeals for the Fourth Circuit.

I.

QUESTIONS PRESENTED

1. Should this Court review a determination of a question of Virginia law made by the United States Court of Appeals for the Fourth Circuit?

2. Was the Court of Appeals correct in deciding that Sims was not entitled to recover anything from Vepco because he had suffered no damage?

II.

STATEMENT OF THE CASE

Sims is the natural father of Jennifer Sims, an infant. Sims and Jennifer's mother, Marilyn Brannon, were divorced December 31, 1969, by a decree of the Law and Equity Court of Chilton County, Alabama, where Mr. and Mrs. Sims were then living. Jennifer's mother has since remarried. Mrs. Brannon was awarded sole custody of Jennifer in the divorce decree and has always had custody of Jennifer. Sims' Petition erroneously states that the decree "made Sims solely responsible for any medical expenses incurred by Jennifer, requiring him to maintain full medical and hospital coverage insurance for her." (Petition p. 2). In fact, the divorce decree did not make Sims solely responsible for any medical expenses incurred by Jennifer. The divorce decree required only that Sims maintain medical insurance coverage for Jennifer.

On May 24, 1972, while living with her mother and stepfather in Fairfax County, Virginia, Jennifer was injured when she climbed a tree in her backyard and contacted a high voltage power line under the control of Vepco. As a result, Jennifer required extensive medical treatment.

An action arising out of this incident, styled *Jennifer Sims, a child, by her natural mother and next friend, Marilyn Brannon* v. *Virginia Electric and Power Company,* was filed in the Circuit Court of Fairfax County, Virginia. Marilyn Brannon waived her right to recover for the expenses of cure in favor of Jennifer in that suit. Sims, who resides in North Carolina beyond the process of the Circuit

Court of Fairfax County, Virginia, was notified of the suit, but was not a party to it. On March 1, 1974, the case was settled with court approval, as required by § 8-170 of the Code of Virginia (1976 Cum. Supp.). Mr. Sims was notified of the terms of the settlement and was asked to join in seeking its approval, but he declined to do so. In the Order Approving Compromise Settlement the court stated that the natural father was outside the jurisdiction of the court. A release was executed by Mr. and Mrs. Brannon. The total amount of the settlement was $475,000.00.

Sims later filed suit against Vepco in a North Carolina state court. Vepco answered and timely removed the action to the United States District Court for the Middle District of North Carolina. Upon motion by Vepco, the action was transferred to the United States District Court for the Eastern District of Virginia pursuant to 28 U.S.C. § 1404(a).

In his Complaint, Sims alleged that his daughter, Jennifer Sims, was injured as a result of the negligence of Vepco. He sought damages for the expenses of curing his daughter, for loss of her services and exemplary damages. The claims for exemplary damages and damages for loss of services were abandoned by Sims during the course of the litigation. Vepco moved for summary judgment on the basis of the prior settlement, but the motion was denied.

The case was tried to a jury on July 1, 1975. The jury rendered its verdict for Sims and awarded damages in the amount of $35,000.00. This judgment was appealed by Vepco to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals vacated the judgment of the District Court and remanded with directions to enter judgment for Vepco. Sims filed his Petition for Writ of Certiorari to this Court on March 18, 1977.

III.

ARGUMENT

A. This Court Should Not Grant A Writ Of Certiorari To Review A Determination Of Virginia State Law Made By The Court Of Appeals.

Rule 19 of the Supreme Court Rules states the considerations governing review on certiorari:

> "1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:
>
> (a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.
>
> (b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision. . . ."

Paragraph (a) speaks to Supreme Court review of decisions of state courts on federal questions and is not applicable here. Sims makes no contention that a federal question is involved in this case; therefore, the portions of paragraph (b) of the Rule relating to decisions based on federal law or federal questions also do not provide a basis for review on writ of certiorari in this case. The only basis for review urged in Sims' Petition and listed as a consideration in Rule 19 is that the

> "court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law. . . ." Rule 19, Supreme Court Rules.

Rule 19 clearly states that review on writ of certiorari will be granted only when there are "special and important reasons" for the review. Mr. Justice Frankfurter's dissent in *Dick* v. *New York Life Insurance Company,* 359 U.S. 437 (1959), contains a comprehensive analysis of the history of the Rule and the sound reasoning behind this Court's long-standing practice of granting writs of certiorari only where the issues are important to the public at large. As stated by Mr. Justice Frankfurter,

> "To bring a case here when there is no 'special and important' reason for doing so, when there is no reason other than the interest of a particular litigant, especially when the decision turns solely on a view of conflicting evidence or the application of a particular local doctrine decided one way rather than another by a Court of Appeals better versed in the field of such local law than we can possibly be, works inroads on the time available for due study and reflection of those classes of cases for the adjudication of which this Court exists." 359 U.S. at 458.

In *Layne & Bowler Corp.* v. *Western Well Works, Inc.,* 261 U.S. 387 (1923), a patent case, this Court dismissed a

writ of certiorari as improvidently granted after finding that there was no genuine conflict between circuits. Mr. Justice Taft explained the importance of adhering to the practice of granting writs only in special cases of interest to the public at large:

> "If it be suggested that as much effort and time as we have given to the consideration of the alleged conflict would have enabled us to dispose of the case before us on the merits, the answer is that it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal." 261 U.S. at 393.

There is no suggestion of a conflict among the circuits. The case at bar is certainly not one of importance to the public that would justify the invocation of the powers of the highest court in the land. The decision of the Court of Appeals is based upon a narrow factual situation. The Court has not, as alleged by Sims' Petition, changed the collateral source doctrine of Virginia. In fact the Court of Appeals held that the collateral source rule did not apply under the particular facts of this case. The Court of Appeals was faced with a narrow fact situation in which a divorced mother with sole custody of a child compromised the claim of the parent and the child as she was entitled to do under § 8-170 of the Code of Virginia. Sims had not paid, nor would he pay in the future, anything for the expenses of curing the child. Payment was made by Sims' insurance carrier because Sims had been required to maintain insurance coverage by the terms of the divorce decree. In

holding that under these facts Sims had suffered no injury and was not entitled to recover anything from Vepco the Court of Appeals was careful to confine its holding to this narrow fact situation.

Review by this Court of the decision of the Court of Appeals is inappropriate for another reason. The decision by the Court of Appeals was based upon its interpretation and application of Virginia law. This Court ordinarily accepts and does not review determinations of state law made by intermediate appellate courts. *E.g., Commissioner* v. *Estate of Bosch,* 387 U.S. 456 (1967); *Pierson* v. *Ray,* 386 U.S. 547 (1967); *The Tungus* v. *Skovgaard,* 358 U.S. 588 (1959); *General Box Co.* v. *United States,* 351 U.S. 159 (1956); *Regan* v. *Merchants Transfer Co.,* 337 U.S. 530 (1949); *Huddleston* v. *Dwyer,* 322 U.S. 232 (1944).

Sims argues that this case involves "the extent of power in a federal court in a diversity action to overturn, in effect, a long-standing and well-settled doctrine of state law." He asserts that the decision by the Court af Appeals is in conflict with Virginia law and with other decisions by the Fourth Circuit interpreting Virginia law. In fact, the Court of Appeals did not overturn any doctrines of Virginia law and the "conflict" with other decisions alleged by Sims does not exist.

The question presented to the Court of Appeals in the case at bar was one of first impression in Virginia. Sims has cited no cases in Virginia or indeed in any other jurisdiction where an action for expenses of cure of a minor was brought by a divorced parent who had not paid any such expenses after the parent with court-ordered custody of the minor had settled with the tortfeasor. Faced with this novel fact situation, the Court of Appeals examined Virginia statutes and analagous cases and determined that under Virginia law

Sims was not entitled to recover from Vepco. This Court defers to the views of courts of appeals on local law as being those of an expert tribunal as to the laws of the states within its circuit. *Estate of Spiegel* v. *Commissioner,* 355 U.S. 701 (1949).

Nor is there a conflict between the decision in the case at bar by the Court of Appeals and other decisions by the Fourth Circuit. The cases cited by Sims in his Petition in support of this illusory conflict are inapposite. In none of the cases cited was the Court of Appeals for the Fourth Circuit faced with a fact situation even remotely similar to the one in the case at bar. Faced with a novel fact situation and an issue never before addressed by the Supreme Court of Virginia or the Court of Appeals for the Fourth Circuit, the appellate court made a considered determination of state law that is entirely consistent with other opinions of the Fourth Circuit and with Virginia Supreme Court cases. The views of the appellate court as to the laws of Virginia in the case at bar should not be reviewed by this Court.

B. The Court Of Appeals Was Correct In Deciding That Sims Was Not Entitled To Recover Anything From Vepco Because He Had Suffered No Damage.

There are no "special and important reasons" for this case to be reviewed by this Court. There is no federal question involved and no conflict with state law or decisions by other courts of appeals. These facts alone constitute sufficient grounds for this Court to deny the writ requested. An additional reason for denial of the writ exists; the Court of Appeals decision is correct.

Under Virginia law, two causes of action arise when an infant is injured by a tortious act. One is the infant's own action to recover damages for pain and suffering, permanent injury and loss of earning capacity. The other is the parent's cause of action for loss of services and expenses of curing the infant. Code of Virginia, § 8-629 (1976 Cum. Supp.); *Moses* v. *Akers,* 203 Va. 130, 122 S.E.2d 864 (1961). The Court of Appeals correctly held that Marilyn Brannon, as the parent who was entitled to the services of Jennifer and who was responsible for the expenses of her cure, had the right to bring suit for those expenses. She also had the right to waive her action in favor of Jennifer. Code of Virginia, § 8-629 (1976 Cum. Supp.); *Moses* v. *Akers,* 203 Va. 130, 122 S.E.2d 864 (1961). Vepco, the tortfeasor, has paid once for the expenses of curing Jennifer, this amount being necessarily included in the settlement.

In his action against Vepco Sims sought to require Vepco to pay the expenses of cure again to him even though they were encompassed in the earlier settlement and even though he had not paid and would not pay any part of the expenses of curing Jennifer. The medical insurance premiums paid by Sims were "in the nature of previously ascertained support payments under the [divorce] decree, not expenses for curing his child." (Opinion p. 13) A parent who has suffered no damage as the result of tortious injury to his child has no right of recovery, *Trueman* v. *United States,* 180 F. Supp. 172 (E.D. La. 1960). The Court of Appeals correctly held that Vepco would not be required to pay twice after it had made a court-approved settlement pursuant to Virginia law.

IV.

CONCLUSION

The Court of Appeals for the Fourth Circuit has given Sims' claims now asserted in support of his Petition for Writ of Certiorari careful and mature consideration and

has rejected them. This Court does not grant certiorari to review an appellate court's determination of state law, and there are no special and important reasons for this Court to review the appellate court decision.

For these and the other reasons stated, this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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April 13, 1977

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